

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Case No. _____ / CIVIL DIVISION

THE SCHOOL BOARD OF
BROWARD COUNTY, FLORIDA,
Plaintiff,

v.
S. Z., A MINOR BY AND THROUGH HER
PARENT, M.Z.
Defendant,

01-7579

CIV-FFERGUSON
MAGISTRATE JUDGE
SNOW

COMPLAINT

Plaintiff, THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, (hereinafter referred to as THE SCHOOL BOARD") hereby files this Complaint against Defendants "S.Z.", by and through her parent, M.Z. ("Mother") and pleads and alleges the following:

JURISDICTION AND VENUE

1. This case arises under the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq. (IDEA). Thus, this court has subject matter jurisdiction pursuant to 20 U.S.C. § 1415(e) (2) of IDEA, 28 U.S.C. §§1331 and 1332, and Florida Administrative Code, Section 6A-6.03311(5) (d).

2. Since all events occurred within the jurisdictional reach of this Court, venue is proper pursuant to 28 U.S.C. §1391.

PARTIES

3. Plaintiff, THE SCHOOL BOARD, is a body corporate and governmental agency duly empowered by the Constitution and statutes of the State of Florida to administer, manage, and operate public schools, within Broward County, State of Florida.

4. Defendant, S.Z., is a resident of Broward County, Florida.

5. Mother, M.Z., is a resident of Broward County, Florida.

6. All conditions precedent to bringing this action have been performed, satisfied, or waived.

FACTUAL BACKGROUND

7. At the time of the hearing, S.Z. was a 13 year old female born December 12, 1987, and was a fifth grader at Panther Run Elementary School, in the Broward County public schools, during the 2000-2001 school year.

8. S.Z. is an exceptional student and falls within the definition of "children with disabilities," as defined by the Individuals with Disabilities Education Act (IDEA).

9. S.Z.'s Exceptional Student Education (ESE) program eligibility is Educably Mentally Handicapped (EMH), speech and language therapy, and occupational therapy.

10. On September 18, 2000, the parties held a meeting to develop Defendant's Individualized Education Program (IEP) for the 2000-2001 school year at Panther Run Elementary School.

11. Persons in attendance at the September 18, 2000 meeting included Defendant's mother; the ESE specialist; the general education teacher; the curriculum supervisor for Plaintiff; the occupational therapist; the evaluation specialist, who was also the speech and language pathologist; the reading specialist; and the guidance counselor.

12. The 2000-2001 IEP indicated that the desired outcome was for Defendant to acquire living skills, academic skills, and social skills in the least restrictive environment.

13. For the 2000-2001 IEP, a determination was made that Defendant would be placed in the regular classroom and indicated that Defendant's participation in the regular classroom was to provide "access to general educational curriculum with homogenous grouping for reading, math and assistance for majority of learning activities" at 100 percent of the time.

14. Defendant's mother did not object to the annual goals or the short-term objectives of the Defendant's IEP at the initial IEP meeting or at any of the subsequent interim review meetings.

15. The September 18, 2000 IEP was reasonably calculated to, and did in fact, offer S.Z. access to a free appropriate public education (FAPE) under IDEA and all applicable Florida laws.

16. To the extent that the IEP contains any defect or omission, such defect or omission was not the proximate cause of any educational harm, was unintentional, and was immaterial to S.Z.'s access to FAPE.

17. S.Z. received academic benefit as a result of her attendance at Panther Run Elementary School during the relevant time period.

18. THE SCHOOL BOARD has complied or substantially complied with the substance and intent of the procedures and procedural safeguards contained in IDEA as well as the relevant state statutes and regulations.

19. THE SCHOOL BOARD provided S.Z. with adequate educational services during the 2000-2001 school year in furtherance of her IEP's goals and objectives.

20. During the 2000-2001 school year THE SCHOOL BOARD delivered and S.Z. received a free and appropriate public education in furtherance of and by implementation of her IEP.

21. The implementation of the IEP by THE SCHOOL BOARD conferred upon, and S.Z received, some educational benefit from her education in Broward County's public schools.

22. On October 11, 2000, S.Z, by and through her counsel, requested a due process hearing regarding whether Defendant was receiving a FAPE from THE SCHOOL BOARD.

23. On October 23, 2000, this matter was referred to the Florida Division of Administrative Hearings and a proceeding entitled S.Z v. BROWARD COUNTY SCHOOL BOARD, (Division Administrative Hearings, State of Florida, (DOAH) Case No. 00-4344E, was initiated. Said hearing was concluded with the filing of a Final Order therein on September 6, 2001.

24. THE SCHOOL BOARD, is a party aggrieved by the proceedings of the administrative hearing and the said Final Order.

25. THE SCHOOL BOARD files this civil action as provided for by the aforementioned statutes and regulations, seeks a new trial *de novo* of all matters, and seeks the opportunity to present additional evidence that was not presented during the administrative hearing.

CONFIDENTIALITY

26. Sections 230.23 (4) (m) (5), Fla. Stat., provides that "...any records created as a result of such hearing shall be confidential and exempt for the provisions of s.119.07 (1) to the extent that the State Board adopts rules establishing other procedures."

27. This matter pertains to the education of a minor child by THE SCHOOL BOARD and otherwise deals with confidential matters.

28. In furtherance thereof, THE SCHOOL BOARD has referred to the identities of the individuals involved herein by use of initials and will make a motion hereafter to assure the confidentiality of the subject matter of this cause.

COUNT I

29. Plaintiff repeats and realleges paragraphs 1 through 28 as if fully set forth herein verbatim.

30. This is an action brought by THE SCHOOL BOARD as a party aggrieved by the Final Order and by the findings and conclusions rendered therein by the Administrative Law Judge of DOAH, all pursuant to the statute and regulations described above and all other applicable state and federal statutory and substantive law.

31. During the fifth grade year, S.Z made some academic progress and received some educational benefit from THE SCHOOL BOARD.

32. At all times relevant during the 2000-2001 school year, THE SCHOOL BOARD observed and re-evaluated S.Z in the classroom at Panther Run Elementary School, and did develop, modify and implement an IEP for S.Z. These attempts were a work in progress as of October 11, 2000, when S.Z, by and through her counsel, requested a due process hearing under IDEA and Florida Administrative Code 6A-603311(5).

33. THE SCHOOL BOARD has made a good faith effort to implement the IEP for S.Z.

34. Solely as a result of the foregoing, THE SCHOOL BOARD seeks a declaration and judgment from this Honorable District Court that declares that THE SCHOOL BOARD has

provided S.Z access to a free and appropriate public education, that declares that THE SCHOOL BOARD has delivered and that S.Z has received some educational benefit, and declares that the September 18, 2000 IEP was proper and appropriate.

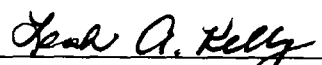
35. In furtherance thereof, THE SCHOOL BOARD seeks an order vacating the Final Order of the Division of Administrative Hearings referred to above and superseding and replacing same with the order and judgment of this Honorable District Court that adopts the aforesaid assertions of the Plaintiff THE SCHOOL BOARD.

WHEREFORE Plaintiff, THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, respectfully requests judgment against Defendants S.Z. and M.Z., as parent of the subject minor child, declaring that THE SCHOOL BOARD provided a free and appropriate public education to S.Z., in a manner that conferred some educational benefit to S.Z., that finds that the IEPs were appropriate, that vacates and replaces the Final Order of the Division of Administrative Hearings, dated September 6, 2001, and that grants such other and further relief in favor of the Plaintiff in this cause that is just and proper.

VERIFICATION OF COMPLAINT

Leah A. Kelly, Director, Exceptional Student Education for The School Board of Broward County, Florida, hereby verifies that she has read the Complaint filed in the above-captioned cause and that every statement contained therein is true and correct to the best of her knowledge, except as to any matters that are stated on information and belief, and as to those matters she is informed and believes them to be true.

The above is given under penalty or perjury under the laws of the State of Florida.

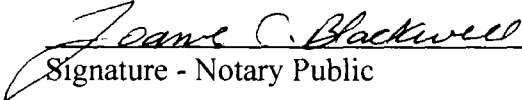

LEAH A. KELLY, DIRECTOR
Exceptional Student Education.

STATE OF FLORIDA
COUNTY OF BROWARD

The foregoing instrument was acknowledged before me this 9th day of October, 2001,
by Leah Kelly, Director of Exceptional Student Education, on behalf of The School Board of
Broward County, Florida. She took an oath and is personally known to me or has produced
N/A as identification.

My Commission expires:

(SEAL)


Signature - Notary Public

My Commission Expires:

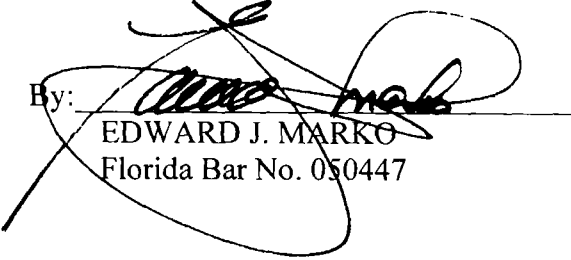
Joanne C. Blackwell
Printed Name of Notary

Respectfully submitted, this 9th day of October, 2001.

OFFICE OF THE SCHOOL BOARD
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MARYLIN BATISTA-McNAMARA
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By:


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Staff\jblackwell\allwork\doah\ese\zamir\appeal\complaint

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

S. Z.,)	
)	
Petitioner,)	
)	
vs.)	Case No. 00-4344E
)	
BROWARD COUNTY SCHOOL BOARD,)	
)	
Respondent.)	
_____)	

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on April 16-18, and June 18, 2001, in Fort Lauderdale, Florida, before Errol H. Powell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Stephen M. Teplin, Esquire
Alexis Yarbrough, Esquire
110 Southeast Sixth Street, 15th Floor
Fort Lauderdale, Florida 33301

For Respondent: Edward J. Marko, Esquire
Broward County School Board
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUES

The issues for determination are whether Respondent has provided Petitioner with a free appropriate public education (FAPE) including, whether Respondent provided Petitioner with an adequate Individualized Education Program (IEP); whether

Respondent included Petitioner in all of the regular classroom activities, and, if not, whether Respondent provided an explanation for the exclusion from all of the regular classroom activities; whether Respondent provided objective reports of Petitioner's progress; whether Respondent notified Petitioner's mother of Petitioner's progress; and whether Respondent implemented adequate assistive technology.

PRELIMINARY STATEMENT

By letter dated October 11, 2000, S. Z. (Petitioner), by and through her counsel, requested a due process hearing regarding whether Petitioner was receiving a FAPE from the School Board of Broward County (Respondent). In addition to the FAPE issue, Petitioner listed 11 issues associated with the FAPE issue. On October 23, 2000, this matter was referred to the Division of Administrative Hearings.

By Order dated November 2, 2000, the 45-day decision requirement was extended. Subsequently, the issues for hearing were narrowed.

At hearing, Petitioner presented the testimony of six witnesses and entered one exhibit (Petitioner's Exhibit numbered 7) into evidence. Respondent presented the testimony of eight witnesses and entered one exhibit (Respondent's Exhibit numbered 4) into evidence. The parties entered 16 joint exhibits (Joint Exhibits numbered 1-5 and 5A-15) into evidence.

Additionally, at hearing, a motion in limine, filed by Respondent, was argued. The undersigned ruled that reading and reading comprehension were not at issue and that, therefore, no testimony regarding reading and reading comprehension would be permitted.

A transcript of the hearing was ordered. The time for filing post-hearing submissions was set for more than ten days following the filing of the transcript. The Transcript, consisting of four volumes, was filed on June 20, 2001, and July 6, 2001. The parties timely filed post-hearing submissions which have been considered in the preparation of this Final Order.

FINDINGS OF FACT

1. Petitioner has Down Syndrome and is classified as Educably Mentally Handicapped (EMH). The parties do not dispute that Petitioner is an exceptional student and falls within the definition of "children with disabilities," as defined by the Individuals with Disabilities Education Act (IDEA). Her exceptional student education (ESE) program eligibility is EMH, speech and language therapy, and occupational therapy.

2. At the time of the hearing, Petitioner was 13 years of age and was a fifth grader at Panther Run Elementary School in Respondent's district. In 1999, at a chronological age of 11 years, Petitioner's age equivalent was determined to be 5.2 years

and she was demonstrating abilities at the moderate to mild ranges of mental deficiency.

3. Petitioner has attended schools in Respondent's district since she was five years of age. She attended Panther Run Elementary School during the 1999-2000 and 2000-2001 school years.

Petitioner's IEP¹

4. On September 18, 2000, a meeting was held to develop Petitioner's IEP for the 2000-2001 school year at Panther Run Elementary. Persons in attendance at the IEP meeting included Petitioner's mother; the ESE specialist; the general education teacher; the curriculum supervisor for Respondent; the occupational therapist; the evaluation specialist, who was also the speech and language pathologist; the reading specialist; the principal; the ESE teacher; the program specialist; and the guidance counselor.

5. The 2000-2001 IEP indicated that the desired outcome was for Petitioner to acquire living skills, academic skills, and social skills in the least restrictive environment.

6. For the 2000-2001 IEP, a determination was made that Petitioner would be placed in the regular classroom, with more than 79 percent non-ESE students. The IEP indicated that Petitioner's participation in the regular classroom was to provide "access to general education curriculum with homogenous

grouping for reading and math and assistance for majority of learning activities" at 100 percent of the time.

7. The IEP further indicated annual goals and short-term instructional objectives, including, among other things, (a) the criteria and the evaluation procedures to determine the mastery, and (b) the identification of the implementors and the persons responsible for documenting Petitioner's mastery of the short-term objectives. Mastery of an objective on the IEP is an indication that progress has been made.

8. Additionally, the IEP included a comment sheet which provided that additional software would be utilized to provide Petitioner with greater access to the computer and that an assistive technology referral would be made. Furthermore, the IEP included an accommodation sheet, which indicated the accommodations to be used and indicated that the accommodations would address how the curriculum would be presented, practiced, and assessed.

9. The 2000-2001 IEP also indicated that, during the duration of the IEP, the priority educational needs of Petitioner were improving Petitioner's academic skills, social skills, and self-help skills.

10. On September 25, 2000, an interim review was held. The persons in attendance included Petitioner's mother; the ESE specialist; the general education teacher; and the ESE teacher,

who was also the evaluation specialist. At the interim staffing, a decision was made to continue with an independent functioning annual goal from the previous year's IEP and to add another goal, with short-term objectives, of Petitioner recognizing the date and month.

11. On October 25, 2000, another interim review was held and the persons in attendance included Petitioner's mother; the ESE specialist; the general education teacher; the ESE teacher, who was also the reading specialist; the evaluation specialist; and the assistant principal. At the interim review, among the items discussed were Petitioner's support facilitation (supplementary aids and services), language therapy (special education services), occupational therapy (related services), and accommodations needed to access the general education curriculum. Among other things, a determination was made to place Petitioner in a regular education classroom for the aforementioned services and for her participation with homogeneous grouping to be 100 percent of the time. Additionally, a re-evaluation plan to begin an assistive technology referral was developed.

12. Further interim reviews were held in January, February, and March 2001, regarding Petitioner's reading instruction and reading remediation plan. Reading and reading comprehension are not at issue.

13. All the parties are in agreement that Petitioner will not be on the same level of the other students or that Petitioner will learn the same amount of material as the other students.

14. However, Petitioner should be provided the same opportunity to learn as the other students and have the same access to the same information as the other students.

15. An inference is drawn that Respondent's employees, who were and are working with Petitioner, have pre-determined that Petitioner's level of achievement and learning abilities will only reach a certain point and will not go beyond that point. To them, it does not matter that Petitioner has progressed to the fifth grade, she will not comprehend fifth-grade material even with accommodations or modifications. Consequently, to Respondent's employees, attempts to present fifth-grade material to Petitioner will not assist Petitioner in progressing.

16. Respondent relied upon the Woodcock-Johnson Test, as a tool, to ascertain a formal assessment of Petitioner. However, the Woodcock-Johnson Test fails to provide adequate information as to what Petitioner could do and alone it, therefore, fails to provide Respondent with sufficient information needed for the purpose of preparing an IEP for Petitioner.

17. Petitioner's IEP for the 2000-2001 school year included nine annual goals and 35 short-term objectives. Eleven of the 35

short-term objectives were repeated from previous years' IEPs in that the realms of instruction and areas of learning were targeted.

18. All the parties agree that the general education curriculum is the beginning point for all students, including Petitioner. The IEP should be built around the general education curriculum, not the general education curriculum built around the IEP.²

19. Petitioner's 2000-2001 IEP fails to address the material that Petitioner, as a fifth grader, is expected to learn. Even though the fifth-grade general education teacher attended the IEP meeting, she had no input into the goals and objectives of the IEP.

20. Petitioner's 2000-2001 IEP does not incorporate the fifth-grade curriculum and it does not appear that the curriculum was taken into consideration. Health, science, and social studies are fifth-grade subjects, but they are not addressed in the IEP. The annual goal of applying time and money concepts is not relevant to the fifth grade general education curriculum; however, they are relevant to Petitioner's individualized needs and are, therefore, appropriate for Petitioner's IEP. The short-term objectives for this annual goal had very little to do with time and money concepts on the fifth-grade level. The annual goals of Petitioner developing a system to plan daily

assignments and seeking assurance from the teacher are not academic/educational priorities; however, they are individualized to Petitioner's needs and are, therefore, appropriate for her IEP. The annual goal of identifying ordinal positions is not an academic/educational priority; however, it is individualized to Petitioner's needs and is, therefore, appropriate for Petitioner's IEP. The goals of improving written communication skills on a computer and functional life skills are too general and need to be more specific to meet Petitioner's individualized needs.

21. The 2000-2001 IEP provides for some subjective, informal evaluations by teachers. Such evaluations, in and of themselves, are not inappropriate.

22. Short-term objectives need criterion for mastery and evaluation procedures. As previously found, mastery of an objective on an IEP is an indication that progress has been made. Some of the short-term objectives in Petitioner's 2000-2001 IEP failed to indicate the criterion for mastery and/or evaluation procedures. For the annual goal of increasing reading comprehension, the short-term objective of sharing a book report with the class lacked the criterion for mastery and the short-term objective of increasing reading fluency lacked an evaluation procedure. For the annual goal of applying time and money concepts, the short-term objective identifying time though the

quarter hour and counting nickels to a dollar lacked the criterion for mastery. For the annual goal of developing a system to plan daily assignments, the short-term objectives of copying assignments from teacher provided roll and putting assignments in a planner lacked both criterion for mastery and evaluation procedures.

23. Respondent should consider goals other than academic goals in developing Petitioner's IEP.³ The same information available at hearing was available at the IEP meeting on September 18, 2000, and such goals should have been considered at that meeting.

24. No evidence was presented to demonstrate that Petitioner's mother objected to the annual goals or the short-term objectives of Petitioner's IEP at the initial IEP meeting or at subsequent interim review meetings.

Petitioner's Inclusion in the Regular Education Classroom⁴

25. Petitioner's 2000-2001 IEP indicates that Petitioner was to be placed in the regular education class (more than 79 percent non-ESE students) 100 percent of the time. Her placement complied with the IEP.

26. The IDEA contemplates inclusion to consist of not only physical presence in the regular education class, but also at the social level, the activity level, the content level, and an extra-class level. Even though Petitioner was physically located

in the general classroom, inclusion was not at the other aforementioned levels for most of the school day.

27. As to the social level, Petitioner was well-liked and accepted by her classmates. Petitioner and her classmates have engaged in informal social contact. However, for an extended part of the school day, Petitioner was seated apart from the rest of the class. As a result, Petitioner was provided with only limited opportunities to interact socially with her classmates.

28. Regarding the activity level, Petitioner was mostly involved in separate activities, not activities with her classmates. Usually, Petitioner was involved in one subject, whereas her classmates, at the same time, were involved in a different subject.

29. As to the content level, Petitioner was not provided access to the same fifth-grade general education curriculum as her classmates. Her general education teacher gave Petitioner a combination of second grade and fifth-grade curriculum. Petitioner was consistently working on a different curriculum than her classmates.

30. Regarding the extra-class level, interaction was very limited.

31. For inclusion to take place, Petitioner must be afforded an opportunity to participate in or have access to the same fifth-grade activities and materials as her classmates in

order to determine what accommodations or modifications to the fifth grade curriculum are to be made. One observation of Petitioner in her fifth-grade class revealed that Petitioner's teacher made an accommodation or modification in the math subject matter for that class day. Inclusion entails participation by Petitioner in all the subject areas as her classmates to determine what accommodations or modifications need to be made to the fifth-grade curriculum.

Objective Progress Reports and Notification of Progress

32. Petitioner's mother saw no progress as to Petitioner's academic ability during the 2000-2001 school year.

33. Petitioner's IEP indicated that reports on Petitioner's progress towards her annual goals would be provided in conjunction with Petitioner's report card.

34. Petitioner's mother received a report card/progress report and IEP annual goals progress report from Panther Run Elementary School during the first quarter of the 2000-2001 school year.

35. During the second quarter, Petitioner's mother received a report card indicating that Petitioner received A's in four subject areas taught at the school. Furthermore, the report card contained a question mark for the subject areas of reading and language arts.

36. During the quarters, Petitioner constantly brought home the same homework, mainly consisting of spelling homework.

37. Moreover, no graded homework, tests, quizzes, or graded reports had been given to Petitioner's mother. Concerned about not having received any of these graded materials and not knowing from where or how Petitioner's grades were being obtained, Petitioner's mother inquired about how Petitioner's grades were obtained.

38. Respondent informed Petitioner's mother that Petitioner's grades were obtained from the IEP goals, second and fifth-grade curriculum, and workbook.

39. However, according to Petitioner's general education teacher, Petitioner's report card does not reflect her progress on her IEP goals and objectives.

40. The IEP annual goals progress report developed by Respondent was a form report. The report addressed progress on annual goals and was for terms, which referred to the marking period of the extended school year, with numerical numbers indicating the extent of progress. The report also included, among other things, a comment section for each term.

41. Petitioner's IEP annual goals progress reports received by Petitioner's mother listed each of Petitioner's nine annual goals of her IEP. The reports covered two terms and for each term, Respondent indicated that Petitioner had obtained a "2,"

which indicated that "some progress made; anticipate meeting goal by IEP end." No comments were included.

42. Respondent's usual practice regarding sending documentation to the home of a disabled child is that the IEP implementers bring documentation, showing mastery of the goals and objectives to the annual IEP review. Unless requested, the documentation is not sent home. No evidence was presented to demonstrate that Respondent informed Petitioner's mother of this practice.

43. Petitioner's mother had no knowledge of the kind of progress being referred to in the IEP annual goals progress reports since she was not aware of any graded homework regarding the IEP goals and objectives.

44. Moreover, no evaluation of Petitioner's mastery of any of the annual goals or short-term objectives was made by Petitioner's general education teacher.

45. Furthermore, neither Petitioner's speech pathologist nor her occupational therapist provided Petitioner's mother with updates on Petitioner's progress. No work samples completed with Petitioner by the speech pathologist were provided to Petitioner's mother. No therapy notes of Petitioner's progress by Petitioner's occupational therapist were provided to Petitioner's mother.

46. Petitioner's IEP indicates that documented teacher observations would serve as the evaluation of Petitioner's progress. However, no documented observations were prepared by Petitioner's general education teacher; and no written observations of Petitioner's progress were made by Petitioner's speech pathologist and teacher's aide.

47. Further, regarding Petitioner's written communication skills on the computer, according to Petitioner's occupational therapist, Petitioner met two of the four short-term objectives.

Implementation of Adequate Assistive Technology

48. Assistive technology is necessary to meet the goals and objectives of Petitioner's IEP.

49. At the initial IEP meeting on September 18, 2000, for Petitioner's 2000-2001 IEP, assistive technology for Petitioner was addressed. Petitioner's mother requested an assistive technology referral.

50. In requesting the referral, Petitioner's mother wanted a re-evaluation of Petitioner's ability and was attempting to promote some type of progress or growth. Petitioner was using the same software that she had used for a number of years, and Petitioner's mother felt that Petitioner had outgrown the software.

51. Petitioner's mother also requested a list of computer programs that Petitioner was using in the classroom. Respondent

failed to provide such a list and no reasonable explanation was provided for its failure.

52. Respondent has an Assistive Technology Referral Form. The Form indicates, among other things, a procedural checklist, with three levels--Level 1, Level 2, and Level 3. Level 1 refers to the development and review of the school-based "MDT Intervention Plan." Level 2 refers to contact with the "Area ESE Program Specialist" for additional recommendations and provides for the Program Specialist to initial this level. Level 3 refers to forwarding of the "Assistive Technology" referral to the "Area AT Specialist."

53. As to Level 1, the initial level, the Assistive Technology Referral Form for Petitioner indicates that the development of the Intervention Plan occurred on November 17, 2000, which was two months after the request by Petitioner's mother. The Form further indicates that the review of the Intervention Plan occurred almost one month later on December 12, 2000.

54. As to Level 2, the Assistive Technology Referral Form for Petitioner indicates that Level 2 occurred on January 9, 2001, which was almost two months after the development of the Intervention Plan.

55. As to Level 3, the Assistive Technology Referral Form for Petitioner indicates that Level 3 occurred on March 13, 2001,

which was two months after the contact with the Area ESE Program Specialist for additional comments.

56. No reasonable or adequate reason was presented by Respondent as to why there was a delay in the assistive technology referral.

57. Evidence was insufficient to demonstrate that in-service training was required for Respondent's teachers.

CONCLUSIONS OF LAW

58. The Division of Administrative Hearings has jurisdiction of these proceedings and the parties thereto pursuant to Subsection 230.23(4)(m), Florida Statutes.

59. Subsection 230.23(4)(m) provides, among other things, that the School Board shall "Provide for an appropriate program of special instruction, facilities, and services for exceptional students"

60. States must comply with the IDEA in order to receive federal funding for the education of handicapped children. The IDEA requires states to establish policy which assures that children with disabilities will receive a FAPE. Through an IEP, the educational program accounts for the needs of each disabled child.

61. Definitions applicable to the IDEA are set forth at 20 U.S.C. Section 1401. "Free appropriate public education" is defined as follows:

(8) The term 'free appropriate public education' means special education and related services that--

(A) have been provided at public expense, under public supervision and direction, without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program

"Special education" is defined as follows:

(25) The term 'special education' means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability including--

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

"Assistive technology service" is defined as follows:

(2) Assistive technology service
The term "assistive technology service" means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. Such term includes--

(A) the evaluation of the needs of such child, including a functional evaluation of the child in the child's customary environment;

(B) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by such child;

(C) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing of assistive technology devices;

(D) coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated

with existing education and rehabilitation plans and programs;

(E) training or technical assistance for such child, or, where appropriate, the family of such child; and

(F) training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of such child.

62. A state meets the IDEA's requirement of a FAPE when it provides personalized instruction with sufficient support services to permit the disabled child to benefit educationally from that instruction. The instruction and services must be provided at public expense, meet the state's educational standards, approximate grade levels used in the state's regular education, and correspond to the disabled child's IEP. Board of Education of Hendrick Hudson Central School District v. Rowley, 102 S.Ct. 3034 (1982).

63. Inquiry in cases involving compliance with the IDEA, which is a de novo inquiry, is twofold: (1) whether there has been compliance with the procedural requirements of the IDEA, including the creation of the IEP, and (2) whether the IEP developed is reasonably calculated to enable the child to receive educational benefits. Rowley, at 3051.

64. A state is not required to maximize the potential of a disabled child commensurate with the opportunity provided to a

non-disabled child. Rather, the IEP developed for a disabled child must be reasonably calculated to enable the child to receive educational benefits. Rowley, at 3048-3049. The disabled child must be making measurable and adequate gains in the classroom, but more than de minimus gains. J.S.K. v. Hendry County School Board, 941 F.2d 1563 (11th Cir. 1991); Doe v. Alabama State Department of Education, 915 F.2d 651 (11th Cir. 1990). The unique educational needs of the particular child in question must be met by the IEP. Todd D. v. Andrews, 933 F.2d 1576 (11th Cir. 1991) "The importance of the development of the IEP to meet the individualized needs of the handicapped child cannot be underestimated." Greer v. Rome City School District, 950 F.2d 668, 695 (11th Cir. 1991).

65. The disabled child's education must be provided in the least restrictive environment available. A determination of such environment requires consideration of whether there has been compliance with the procedural requirements of the IDEA and whether the IEP is reasonably calculated to enable the child to receive educational benefits. DeVries v. Fairfax County School Board, 882 F.2d 876 (4th Cir. 1989).

66. Regarding the IEP, 20 U.S.C. Section 1414 provides in pertinent part:

(d) Individualized education programs

(1) Definitions

As used in this chapter:

(A) Individualized education program

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes--

(i) a statement of the child's present levels of educational performance, including--

(I) how the child's disability affects the child's involvement and progress in the general curriculum; or

(II) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;

(ii) a statement of measurable annual goals, including benchmarks or short-term objectives, related to--

(I) meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum; and

(II) meeting each of the child's other educational needs that result from the child's disability;

(iii) a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child--

(I) to advance appropriately toward attaining the annual goals;

(II) to be involved and progress in the general curriculum in accordance with clause (i) and to participate in extracurricular and other nonacademic activities; and

(III) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this paragraph;

(iv) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in clause (iii);

(v)(I) a statement of any individual modifications in the administration of State or districtwide assessments of student achievement that are needed in order for the child to participate in such assessment; and
(II) if the IEP Team determines that the child will not participate in a particular State or districtwide assessment of student achievement (or part of such an assessment), a statement of--

(aa) why that assessment is not appropriate for the child; and

(bb) how the child will be assessed;

(vi) the projected date for the beginning of the services and modifications described in clause (iii), and the anticipated frequency, location, and duration of those services and modifications;

* * *

(viii) a statement of--

(I) how the child's progress toward the annual goals described in clause (ii) will be measured; and

(II) how the child's parents will be regularly informed (by such means as periodic report cards), at least as often as parents are informed of their nondisabled children's progress, of--

(aa) their child's progress toward the annual goals described in clause (ii); and

(bb) the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

67. The first part of the twofold inquiry stated in Rowley, supra, is answered in the negative. Respondent failed to indicate the criterion for mastery and/or evaluation procedures for six short-term objectives. Respondent has failed to comply with the procedural requirements of the IDEA, as indicated; the other procedural requirements have been met.

68. The second part of the inquiry stated in Rowley, supra, is also answered in the negative. Petitioner's IEP for the 2000-2001 school year as a whole is not reasonably calculated to enable Petitioner to receive educational benefits.

69. In examining an IEP, great deference is given to the educators who develop the IEP. Todd, at 1581. However, no deference is due a school district when the district fails to consider what benefit a handicapped child would receive from education in a regular classroom with appropriate supplemental aids and services. Greer, at 698.

70. First, Petitioner's IEP fails to address or incorporate the fifth grade curriculum. Petitioner contends that the general curriculum at the specific grade level should be considered; whereas, Respondent contends that specific grade level should not be considered. The specific grade level should be considered. In Greer, supra, the court did not examine only the general education curriculum but examined the general education curriculum at the disabled child's specific grade level to

determine if the school district modified the curriculum to accommodate the child in the regular class room. Greer, at 698.

71. In the case sub judice, Respondent failed to address or incorporate the fifth grade curriculum in the development of the IEP, thereby, failing to address Petitioner's individualized needs as to the fifth-grade curriculum. Respondent failed to consider what benefit Petitioner would receive from education in a regular fifth-grade classroom with appropriate supplemental aids and services. Even though Respondent demonstrated that Petitioner progressed in the general education curriculum, such progress does not negate or erase the requirement that Petitioner's IEP should have addressed the general education curriculum at the fifth-grade level.

72. Second, even though Petitioner's IEP provides for the goals of improving written communication skills on a computer and functional life skills, the goals should be more specific to meet Petitioner's individualized needs.

73. Third, at the IEP meeting on September 18, 2000, Respondent should have considered goals other than academic goals in developing the IEP.

74. Lastly, Respondent failed to provide for Petitioner's inclusion beyond physical presence in the fifth grade classroom. The IDEA in 20 U.S.C. Section 1412, addresses mainstreaming or placement in the least restrictive environment of handicapped

children in public schools that receive public funding by requiring schools to establish certain procedures and provides in pertinent part:

(a) In general

A State is eligible for assistance under this subchapter for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions:

* * *

(5) Least restrictive environment

(A) In general

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

75. The IDEA further provides at 20 U.S.C. Section 1414(d)(1)(A)(iii) and (iv), that the IEP address and provide for the placing of handicapped children in the least restrictive environment.

76. Petitioner's 2000-2001 IEP indicates that she was to be placed in the regular education class 100 percent of the time and in this respect, Petitioner's IEP complied with the IDEA.

77. When determining the appropriateness of inclusion, both academic and non-academic benefits should be considered.

Sacramento City Unified School District, Board of Education v. Holland, 14 F.3d 1398 (9th Cir. 1994).

78. Petitioner was provided limited opportunities to interact at the activity level, the social level, the content level, and the extra-class level. The opportunities should be greater.

79. As to progress reports, no documented teacher observations were made by Petitioner's general education teacher and speech pathologist and the teacher's aide. As a result, no objective criteria for evaluating Petitioner's progress existed. Consequently, even though the progress reports indicate some progress, they fail to have documentation in support thereof. Moreover, no progress can be shown using the criteria established for demonstrating progress. Since no progress can be shown, Respondent was unable to provide Petitioner's mother with adequate progress reports as required in Petitioner's IEP.

80. The IDEA requires that the implementation of the IEP "must" be "as soon as possible" following the meeting. 34 C.F.R. Section 300.342(b)(2).

81. Petitioner's IEP developed on September 18, 2000, provided for assistive technology referral. The assistive technology referral was not forwarded to the Area AT Specialist

until March 13, 2001, almost six months after the request by Petitioner's mother for the referral. There was an undue delay in providing Petitioner with assistive technology.

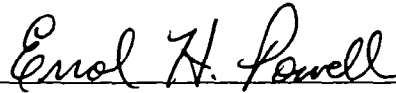
CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that:

1. The IEP of September 18, 2000, fails to provide S. Z. with a FAPE and is not appropriate. Broward County School Board and S. Z.'s mother must meet and develop an IEP consistent with this Final Order.
2. Evaluation procedures for the short-term objectives developed for the annual goals must be in compliance with the IEP developed.
3. Broward County School Board shall provide S. Z.'s mother with progress reports of S. Z.'s annual goals and short-term objectives.
4. Broward County School Board shall complete, without delay, the process for the assistive technology referral.
5. Broward County School Board shall provide S. Z.'s mother with a list of computer programs that S. Z. uses at school.

DONE AND ORDERED this 6th day of September, 2001, in
Tallahassee, Leon County, Florida.



ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847

Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of September, 2001.

ENDNOTES

^{1/} Petitioner's expert witness was more credible than Respondent's expert witness regarding academic/educational issues. However, Respondent's expert witness was more credible regarding social skills and life skills issues.

^{2/} The parties disagree as to what is the general education curriculum. Petitioner asserts that the general education curriculum is at the specific grade level. Respondent asserts that the general curriculum is not at any specific grade level.

^{3/} Respondent's expert recommends that, in future IEPs, Respondent should examine goals other than academic goals for Petitioner.

^{4/} See Endnote 1.

COPIES FURNISHED:

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Honorable Charlie Crist, Commissioner
Department of Education
The Capital, Plaza Level 08
Tallahassee, Florida 32399-0400

Dr. Frank L. Till, Jr., Superintendent
School Board of Broward County
600 S. E. Third Avenue
Fort Lauderdale, Florida 33301-3125

NOTICE OF RIGHT TO SEEK JUDICIAL RELIEF

This decision and its findings are final, unless an adversely affected party:

- a) brings a civil action within 30 days in the appropriate federal district court pursuant to Section 1415(i)(2)(A) of the Individuals with Disabilities Education Act (IDEA); [Federal court relief is not available under IDEA for students whose only exceptionality is "gifted"] or
- b) brings a civil action within 30 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 230.23(4)(m)5, Florida Statutes; or
- c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 230.23(4)(m)5 and 120.68, Florida Statutes.

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket system. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM)

I. (a) PLAINTIFFS

The School Board of Broward County,
Florida

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Broward
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) ATTORNEYS (FIRM NAME ADDRESS AND TELEPHONE NUMBER)

Edward J. Marko, Esq. 954-765-8866
600 SE 3rd Ave, 11th Floor
Fort Lauderdale, Florida

DEFENDANTS

S. Z., a minor by and through her
Parent, M. Z.

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT Broward
(IN U.S. PLAINTIFF CASES ONLY)

NOTE IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

ATTORNEYS (IF KNOWN)

MAGISTRATE JUDGE
SNOW

(d) CIRCLE COUNTY WHERE ACTION AROSE DADE, MONROE, BROWARD, PALM BEACH, MARTIN, ST. LUCIE, INDIAN RIVER, OKEECHOBEE HIGHLANDS

II. BASIS OF JURISDICTION

(PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff ☒ 3 Federal Question (U.S. Government Not a Party)
☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES

(For Diversity Cases Only)

(PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. ORIGIN Appeal from Final Order (PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 Original Proceeding ☒ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

V. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

A CONTRACT	A TORTS	FORFEITURE/PENALTY	A BANKRUPTCY	A OTHER STATUTES
<input type="checkbox"/> 118 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault Libel & Slander <input type="checkbox"/> 330 Federal Employers Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 810 Agriculture <input type="checkbox"/> 820 Other Food & Drug <input type="checkbox"/> 825 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 830 Liquor Laws <input type="checkbox"/> 840 R.R. & Truck <input type="checkbox"/> 850 Airline Regs. <input type="checkbox"/> 860 Occupational Safety/Health <input type="checkbox"/> 880 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 A PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 881 Agricultural Acts <input type="checkbox"/> 882 Economic Stabilization Act <input type="checkbox"/> 883 Environmental Matters <input type="checkbox"/> 884 Energy Allocation Act <input type="checkbox"/> 885 Freedom of Information Act <input type="checkbox"/> 890 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 895 Constitutionality of State Statutes <input type="checkbox"/> 896 Other Statutory Actions A OR B
A REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Tort to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 250 All Other Real Property	A CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input checked="" type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 Habeas Corpus <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	A LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor Mgmt. Relations <input type="checkbox"/> 730 Labor Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Rel. Inc. Security Act	B SOCIAL SECURITY <input type="checkbox"/> 881 HIA (1395m) <input type="checkbox"/> 882 Black Lung (923) <input type="checkbox"/> 883 DIWC/DIWW (405(g)) <input type="checkbox"/> 884 SSD Title XVI <input type="checkbox"/> 885 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS - Third Party 26 USC 7606

VI. CAUSE OF ACTION

(CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)

Individuals with Disabilities Education Act, 20 U.S.C. Section 1400 ("IDEA")

LENGTH OF TRIAL

via 3 days estimated (for both sides to try entire case)

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER FRCP 23 ☐

DEMAND \$

CHECK YES only if demanded in complaint

JURY DEMAND: ☐ YES ☒ NO

VIII. RELATED CASE(S) IF ANY

Administrative DOAH Case No. 00-4344E
JUDGE Errol H. Powell, Law Judge DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT 323647 AMOUNT \$0.00 APPLYING IFP 10/9/01 JUDGE